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Supreme Court, U.S.
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No. 95-102

In the

Supreme Court of the United States

October Term, 1995

ALMA TORREBLANCA DE AGUILAR, et al.,

Petitioners,

v.

THE BOEING COMPANY, et al.,

Respondents,

v.

COMPANIA MEXICANA DE AVIACION, S.A.,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT THE BOEING COMPANY

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QUESTIONS PRESENTED

By ruling that plaintiffs — some of the heirs of 69 decedents killed in an airplane accident in Mexico — had not in good faith sued for less than the amount required for diversity jurisdiction, did the court of appeals render a decision in conflict with the decision of another court of appeals on the same matter or so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where:

- it was facially apparent that the damages sought on behalf of decedents' estates under the Texas Survival Statute rose to a level above $50,000 per decedent;

- the Notice of Removal set forth the grounds for concluding that the amount in controversy exceeded $50,000 per decedent;

- the prayer for damages less than the jurisdictional limit was improper and meaningless under Rule 47 of the Texas Rules of Civil Procedure, leading the court of appeals to conclude that plaintiffs were engaged in "manipulation" of the pleadings; and

- plaintiffs' claim that they were personal representatives of the decedents' estates was shown to be false, and plaintiffs, as only some of the decedents' heirs, lacked the authority to limit the damages claimed by the estates.

PARTIES

Petitioners' identification of the parties omits the third-party defendant-respondent Compania Mexicana de Aviacion, S.A. ("Mexicana").

The identity of petitioners, whose names do not appear in the caption and are not set forth in the list of parties in the Petition, are listed in the caption of Plaintiffs' Original Petition, Appendix D of Appendices to Petition for Writ of Certiorari (hereinafter "Pet. App.") at A79-86.

Petitioners' identification of the parties lists a number of attorneys and law firms, none of whom is a party to these proceedings.

STATEMENT TO COMPLY WITH RULE 29.1

The Boeing Company has no parent company and no subsidiary companies that are not wholly owned.

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BRIEF IN OPPOSITION OF RESPONDENT THE BOEING COMPANY

OPINIONS BELOW

Petitioners' appendices omit a paragraph of the district court's Order Granting Defendant's Motion to Dismiss Based on Forum Non Conveniens. Pet. App. B. The complete Order is reproduced as Appendix A to Respondent Boeing's Brief in Opposition (hereinafter "Boeing App.").

Petitioners' citation to the decision of the court of appeals whose judgment is sought to be reviewed is incorrect. The correct citation is *de Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995).

STATEMENT OF THE CASE

Petitioners are 38 of the heirs of 69 foreign nationals, primarily from Mexico, who died when a Boeing 727 that was operated by Mexicana crashed outside of Mexico City on March 31, 1986. Original Petition, Pet. App. D at A88-93. The passengers and crew on board the aircraft were predominantly Mexican nationals. All were killed. Record on Appeal ("Rec.") at 429-35.

Petitioners are claiming damages for the decedents' pre-death "mental anguish and pain and suffering" pursuant to the Texas Survival Statute, Tex. Civ. Prac. & Rem. Code Ann. § 71.021 (Vernon 1986). Original Petition, Pet. App. D at A88, A103-04. An agency of the Mexican government investigated the accident and concluded that when the aircraft was at approximately 30,000 feet an explosion occurred in the aircraft's wheel well, followed by an in-flight fire in the passenger compartment that lasted until after the aircraft broke apart, approximately three minutes after the explosion. Rec. at 226. The aircraft descended approximately 15,000 feet before it broke apart. *Id.*

This action was commenced on October 28, 1992 — more than six and one-half years after the accident at issue and nearly six years after petitioners were first told that Mexico was a more convenient forum than Texas for their claims. This is in fact the eighth action filed on behalf of some or all of the petitioners in a U.S. court. As described in more detail below, petitioners' seven previous actions against one or more of the defendants were dismissed (a) voluntarily by plaintiffs; (b) on the ground of *forum non conveniens*; or (c) for failure to prosecute. United States District Courts for

the Western District of Texas, the Northern District of Illinois and the Eastern District of Texas, as well as the Superior Court for King County, Washington, have concluded that Mexico is the appropriate forum for petitioners' claims. The Fifth Circuit Court of Appeals has affirmed dismissals of petitioners' claims in favor of the courts of Mexico on three occasions. This Court declined in 1988 to review the dismissal of petitioners' claims following the first dismissal.[1]

I. THE PRECEDING ACTION (*DE AGUILAR I*)

To place this action in its proper context, it is essential to review briefly the facts of petitioners' seventh filing, the dismissal of which was affirmed in *de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993) ("*de Aguilar I*"). In *de Aguilar I*, 80 named plaintiffs (20 of whom were minors) and 100 unnamed, or "Doe," plaintiffs brought claims on behalf of the same 69 decedents named in this action. Rec. at 917-23. In their Original Petition in *de Aguilar I*, plaintiffs alleged that they were bringing the action "as personal representatives of the estates of each decedent named below, in their own individual capacities and as next friends of named minor children and as heirs of each decedent named below." Rec. at 372. In accordance with Rule 47 of the Texas Rules of Civil Procedure, plaintiffs did not plead for a specific amount of damages, but prayed "for a sum in excess of the minimal [sic] jurisdictional limits of the Court." Rec. at 385.

Defendants removed the action to the United States District Court for the Eastern District of Texas. Following removal, plaintiffs filed two affidavits of their Houston attorney, Dennis C. Reich, purporting to limit the damages sought. Plaintiffs then moved to remand on the ground that

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[1] *Rodriguez Diaz v. Mexicana de Avion, S.A.*, 488 U.S. 826 (1988) (*cert. denied*).

the amount in controversy was less than $50,000. On April 2, 1992, the district court denied plaintiffs' motion to remand, holding, in part, that Mr. Reich's post-removal affidavits were irrelevant to the amount in controversy because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *de Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992). The district court also held that even if Mr. Reich's affidavits were relevant to the jurisdictional inquiry, they were insufficient to limit the amount in controversy because "the complaint names one hundred unknown plaintiffs who are not bound by the affidavit of plaintiffs' counsel" and because "plaintiff's counsel cannot compromise or agree to judgment on behalf of any minor beneficiaries of wrongful death suits without leave of court."[2] *Id.* at 695.

After denying plaintiffs' motion to remand, the district court dismissed plaintiffs' claims on the ground that the Eastern District of Texas was not a convenient forum for such claims. *de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993). Plaintiffs appealed the dismissal to the Fifth Circuit Court of Appeals, which affirmed both the district court's denial of plaintiffs' remand motion and the dismissal of plaintiffs' claims for refiling in the courts of Mexico. *de Aguilar I*, 11 F.3d 55 (5th Cir. 1993).

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[2]Neither the district court nor defendants were aware in April of 1992 that none of the plaintiffs had been appointed as personal representatives of the decedents' estates, and that plaintiffs' allegations on this point were false. *See infra* at 6.

II. COURSE OF PROCEEDINGS IN THIS ACTION (*DE AGUILAR II*)

A. The Original Petition and Affidavit of Counsel

Shortly after the district court dismissed *de Aguilar I*, petitioners' U.S. attorneys filed this action in the 60th Judicial District Court, Jefferson County, Texas. Original Petition, Pet. App. D at A78-105. In their latest Petition, petitioners' attorneys (1) dropped 42 of the heirs (including all 20 minors) who were named in *de Aguilar I*; (2) dropped all mention of the unnamed "Doe" plaintiffs; (3) dropped the wrongful death claims asserted in *de Aguilar I*; (4) alleged that "Plaintiffs are representatives of the estates of the decedents and bring this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute"; and (5) included a prayer for a specific amount of damages in violation of Rule 47 of the Texas Rules of Civil Procedure. *Id.*

In addition, petitioners attached to the Original Petition an affidavit signed by Dennis C. Reich, one of petitioners' Texas attorneys. In his affidavit, Mr. Reich stated, among other things, that "[p]laintiffs hereby irrevocably agrees [sic] to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case" and that "[t]his cap should be set as fifty thousand dollars ($50,000.00) exclusive of interest and court costs." *Id.* at A106-08.

B. Boeing's Effort to Clarify the Amount in Controversy

Boeing was served with the Original Petition in this matter on November 12, 1992. To determine whether Mr. Reich's statements constituted a binding and irrevocable limitation on the estates' damages, counsel for Boeing, Howard L. Close, tendered a new affidavit to Mr. Reich on November 25, 1992.

Boeing asked Mr. Reich to attest, among other things, that the 38 plaintiffs named in the complaint had been appointed as the personal representatives of the decedents' estates and that these plaintiffs had expressly authorized Mr. Reich to make a binding and irrevocable admission on their behalf. *See* Notice of Removal and accompanying Affidavit of Howard L. Close, Boeing App. B.

As set forth in the Notice of Removal and the accompanying Affidavit of Howard L. Close, Boeing App. B, and subsequently described in the court of appeals' decision, plaintiffs' attorneys "refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates" and "essentially . . . abandoned their claim as personal representatives." *de Aguilar v. Boeing Co.*, 47 F.3d 1404, 1406, 1414-15 (5th Cir. 1995) ("*de Aguilar II*"). In argument before the court of appeals, plaintiffs claimed "that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that *they were suing as heirs not representatives*." *Id.* at 1406 (emphasis added).

Having determined that the 38 plaintiffs named in the Petition were merely some of the individual heirs of the 69 decedents, and that they did not have the authority to limit damages sought on behalf of those decedents' estates, defendants timely removed the action to the United States District Court for the Eastern District of Texas, where it was assigned to The Honorable Richard A. Schell. In their Notice of Removal, defendants demonstrated that plaintiffs' purported limitation on the amount of the claims of the decedents' estates was meaningless, and that without an effective limitation the amount in controversy exceeded $50,000 per decedent. *Id.*

C. Ms. Bistrain's Post-Removal Affidavit

Realizing that they had failed effectively to limit the amount in controversy prior to removal, petitioners' U.S.

attorneys filed on May 6, 1993 — nearly three months after defendants removed petitioners' claims to federal court — a Supplemental Motion to Remand and attached a one-page affidavit signed by Ms. Guadalupe Bistrain, one of petitioners' Mexican attorneys. Pet. App. F at A122-23. In her affidavit, Ms. Bistrain swore that she had received "explicit authority from each of the plaintiffs . . . to limit their damages" and that "plaintiffs . . . are authorized to sue in their capacity as an heir . . . and/or personal representative." *Id.*

Ms. Bistrain's affidavit said nothing as to when the plaintiffs purportedly communicated the authority to limit "their damages." She also did not indicate the basis for her opinion on capacity to sue and did not (and could not) state that any of the plaintiffs had the authority to agree to a limitation on the damages sought on behalf of the decedents' estates.

D. The Order Denying Plaintiffs' Remand Motion

Judge Schell denied plaintiffs' motion to remand on June 8, 1993. The primary basis for Judge Schell's ruling was that "Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit." Memorandum Opinion and Orders Denying Motions to Remand and Motion to Strike Third Party Complaint or Alternatively Sever Third Party Action ("Mem. Op."), Pet. App. A at A26. Because he determined that plaintiffs failed to demonstrate that their purported limitation on the estates' damages was binding and effective, Judge Schell ruled that "the amount in controversy exceeded $50,000 at the time of removal." *Id.*

Shortly thereafter, Judge Schell granted a motion by defendants to dismiss plaintiffs' action pursuant to the doctrine of *forum non conveniens*.

E. The Court of Appeals' Affirmance

Petitioners appealed the dismissal to the Fifth Circuit Court of Appeals, which, in an opinion issued on March 7, 1995, affirmed both the district court's denial of petitioners' motion for remand and the dismissal on the ground of *forum non conveniens*. *de Aguilar II*, 47 F.3d at 1406.

The court of appeals held that defendants had "easily" shown by a preponderance of the evidence that the actual amount in controversy exceeded $50,000. 47 F.3d at 1412. The court went on to observe that "[t]he face of plaintiffs' pleading will not control if made in bad faith" and that "[p]laintiffs acknowledged . . . that their filing violated rule 47(b) [of the Texas Rules of Civil Procedure]." *Id.* at 1410, 1412. Rejecting plaintiffs' attempted manipulation of the pleadings, the court of appeals ruled that the prayer for damages in the Original Petition did not limit the amount in controversy. *Id.* at 1412-13.

Turning to the affidavits submitted by plaintiffs' attorneys, the court ruled that plaintiffs could not effectively limit the amount in controversy unless they had the authority to bind the estates. *Id.* at 1413. The court considered plaintiffs' argument that their authority to limit the estates' claims should be determined under Mexican law. After examining the respective interests of Texas and Mexico in the application of their law to the issue of plaintiffs' authority, the court concluded that Texas law applied. *Id.* at 1414.

The court observed that plaintiffs had essentially abandoned their claims as personal representatives and instead purported to be the decedents' legal heirs. *Id.* at 1414-15. The court ruled that plaintiffs had not alleged any of the elements necessary under Texas law to establish their authority to compromise the claims of the decedents' estates. *Id.* at 1415. In addition, the court noted that defendants had offered evidence — and plaintiffs' attorney had acknowledged at oral argument

— that plaintiffs were not the sole heirs and, therefore, lacked authority to limit the estates' claims. *Id.* Accordingly, the court of appeals concluded:

> Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.

Id.

III. PETITIONERS' OTHER ACTIONS IN THE UNITED STATES AND MEXICO

As discussed above, petitioners had filed six other actions in the United States against some of the defendants when they filed *de Aguilar I*.[3] The previous actions confirm that many of these 69 decedents' heirs are not parties to this action. In both *Estavillo* and *Wolf*, as well as *de Aguilar I*, all of which involve the same 69 decedents named herein, 80 persons, rather than the 38 named in this action, were specifically named in the complaints as heirs. Furthermore, the plaintiffs in *Wolf* specified that the listing of 80 heirs for these 69 decedents was "a partial listing" and that "[a]dditional survivors will be named." Rec. at 343-46.

In addition to eight actions filed in U.S. courts, claims arising from the Mexicana accident are presently pending against Mexicana in Civil District Court in Mexico. Rec. at 227, 403-21. The plaintiffs in that action, several of whom are

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[3]The *Rodriguez*, *Penasco (Texas)*, *Penasco (Illinois)*, *Penasco (California)*, *Estavillo* and *Wolf* actions are summarized at pages 183-85 of the Record on Appeal.

also plaintiffs in this action, described the claims of the decedents' estates as follows:

> [T]he persons who died in this crash underwent minutes of terrible suffering when the damage began and the plane caught fire. They realized that the airliner would inevitably crash. . . . Your Honor may take as a basis *the amount of $75,000 or more*, or its equivalent in pesos, by way of reparation for pain and suffering caused to the victims of the crash.

Rec. at 414 (emphasis added).

REASONS FOR DENYING THE WRIT

Boeing respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the court of appeals' decision in this case because:

(1) The court of appeals did not depart from the accepted and usual course of judicial proceedings by holding that plaintiffs who desire to sue for less, and thereby avoid trying their case in federal court, must do so in good faith and not merely manipulate the pleadings to create the illusion that the amount in controversy is less; and

(2) The decision of the court of appeals that plaintiffs did not effectively sue for less does not conflict with the decision of another court of appeals on the same matter.

I. THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY HOLDING THAT PLAINTIFFS WHO DESIRE TO SUE FOR LESS, AND THEREBY AVOID TRYING THEIR CASE IN FEDERAL COURT, MUST DO SO IN GOOD FAITH AND NOT MERELY MANIPULATE THE PLEADINGS TO CREATE THE ILLUSION THE AMOUNT IN CONTROVERSY IS LESS

The principle enunciated by this Court in *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938), that if a plaintiff "does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount" is not at issue in this case. The Fifth Circuit Court of Appeals did not, as petitioners contend, disregard this principle. Rather, the court of appeals correctly determined on the facts of this case that petitioners had not in good faith sued for less, but had engaged in "manipulation" of the pleadings.

A. The Court of Appeals Correctly Determined That, Absent an Effective Limitation on the Estates' Damages, the Amount in Controversy Was in Excess of $50,000 Per Decedent

In support of their removal of this action, defendants first demonstrated to the district court that absent an effective limitation on the estates' damages the amount in controversy was in excess of $50,000 per decedent.[4] Defendants presented evidence that if the decedents' estates were entitled to recover

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[4] Since the Texas Survival Statute creates a single right of action for the damages sustained by the decedent, the claims of all the persons entitled to share in the proceeds of each decedent's estate must be aggregated to determine the amount in controversy. *See Shields v. Thomas*, 58 U.S. 3 (1855); *Insurance Co. of N. Am. v. Chinowith*, 393 F.2d 916 (5th Cir.), *cert. denied*, 393 U.S. 990 (1968).

under Texas law, as plaintiffs alleged, and if plaintiffs could prove by credible evidence that the "decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering," as plaintiffs also alleged, then the probable recovery by the estates was in excess of $50,000 per decedent. *See* Rec. at 181-82, 216-435, 436-40.

At no time in the district court or in the court of appeals have petitioners challenged defendants' showing on this issue. Thus, all the evidence supports a finding that the injuries alleged in the Original Petition, if proven, would support a probable verdict in excess of $50,000 per decedent. This evidence led the court of appeals to conclude that "it is facially apparent that the damages rise to a level above $50,000." *de Aguilar II*, 47 F.3d at 1412. In view of petitioners' failure to identify any contrary evidence, this conclusion undoubtedly was correct.

B. The Court of Appeals Correctly Determined That the Prayer for Damages Relied on by Petitioners Was Improper and Meaningless

The state complaint in this case was filed in Texas, which has the following rule:

> An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limit of the court.

Tex. R. Civ. P. 47(b). Since plaintiffs' claims were for unliquidated damages, the only statement concerning the amount of damages permitted by the Texas Rules of Civil Procedure was that the damages sought exceed the minimum jurisdictional limits of the state court. *See Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex. 1986) ("Rule 47 precludes a party, except by response to a special

exception, from pleading unliquidated damages in a specific amount."). The statements in the Original Petition purporting to limit the amount of damages claimed clearly violated Texas pleading requirements. Indeed, "[p]laintiffs acknowledged during oral argument [before the court of appeals] that their filing violated rule 47(b)." *de Aguilar II*, 47 F.3d at 1412. Thus, the prayer for damages could not effectively limit the amount in controversy. As the court of appeals stated:

> A plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

Id.

C. The Court of Appeals Correctly Determined That Petitioners Lacked the Authority to Limit the Estates' Claims

1. Petitioners' Assertion That *Saint Paul Mercury* Barred Any Inquiry Into Petitioners' Authority to Limit the Estates' Claims Is Groundless

Petitioners contend that the court of appeals should not have considered whether plaintiffs were authorized to limit the estates' claims. Petitioners characterize the court's consideration of this issue as a collateral attack on the pleadings and assert that this Court's decision in *Saint Paul Mercury* prohibited such an attack. Petition at 40-41.

In *Saint Paul Mercury*, the plaintiff's state court complaint sought damages in excess of the jurisdictional amount. It was only after removal that the plaintiff amended his complaint to

seek less than the jurisdictional amount. This Court held that the post-removal amendment did not change the amount in controversy at the time of removal and, therefore, did not divest the federal court of jurisdiction. This Court observed that if a plaintiff does not desire to try his case in federal court "he may resort to the expedient of suing for less than the jurisdictional amount." 303 U.S. at 294.

The issue in the present case was whether plaintiffs had in fact sued for less, which issue *Saint Paul Mercury* did not address. Nothing this Court said in *Saint Paul Mercury* supports petitioners' contention that once a plea for less than the jurisdictional amount is made, the federal courts are powerless to inquire into whether that plea was made in good faith, and effectively limits the amount sued for.

Petitioners' characterization of the decision below as a collateral attack on their pleadings is likewise frivolous. Defendants had the burden of proving the existence of federal jurisdiction. As discussed above, defendants met that burden by showing, by a preponderance of the evidence, that it was more likely than not that each decedent's claim met the jurisdictional minimum. It was plaintiffs, not defendants, who had the burden of proving that they had the authority to limit the estates' damages. This conclusion follows from the general principle that proof of a matter of avoidance is the burden of the party asserting it irrespective of who has the burden on the underlying issue. *See, e.g., Kabealo v. Huntington Nat'l Bank*, 17 F.3d 822 (6th Cir.), *cert. denied*, 115 S. Ct. 64 (U.S. 1994); *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974) ("Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them."). Although a removing defendant must show facts establishing federal jurisdiction, it does not bear the burden of proving the absence of waiver, which rests with the party seeking to establish waiver.

An analogous case is *City of New York v. Pullman Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979), in which the defendant removed under 28 U.S.C. §§ 1441 and 1332, showing the existence of diversity of citizenship and the requisite amount in controversy. The plaintiff moved to remand, asserting that the parties had, by agreement, waived their right to proceed in federal court. The court placed the burden of proof regarding that issue on the plaintiff, stating:

> The normal construction of the jurisdiction rules includes a presumption that, where jurisdiction exists, it cannot be ousted or waived absent a clear indication of such a purpose . . . .

Id. at 443. Thus, once defendants established that the amount in controversy exceeded $50,000, plaintiffs were required to provide "clear" evidence that federal court jurisdiction had been "ousted."

2. Petitioners Have Not Argued That Under Texas Law They Had The Authority To Limit The Estates' Claims

The personal representative is the ordinary person to prosecute claims on behalf of an estate under Texas law. *See* Tex. Prob. Code § 233A; *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801 (1956). Plaintiffs recognized this basic principle in their Original Petition by alleging that they were personal representatives. Original Petition, Pet. App. D at A86-87. However, that allegation turned out to be false.[5]

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[5] Petitioners' description of their status to this Court is less than forthright. Under the heading "Questions Presented," petitioners describe themselves as "representatives of estates of decedents." Petition at i. Under the heading "Statement of the Case and Procedural History," petitioners describe plaintiffs in *de Aguilar I* as "[r]elatives

Thus, the reality was that plaintiffs commenced the action as individual heirs of the decedents — a procedure permitted by Texas law. Tex. Civ. Prac. & Rem. Code § 71.021; *Handley v. City of Seagoville*, 798 F. Supp. 1267 (N.D. Tex. 1992).

Because plaintiffs were really proceeding in their individual capacities, Texas law required them to demonstrate that they were the *sole heirs* of the decedents in order to compromise the estates' claims or take them to judgment. *Martinez v. Angerstein*, 517 S.W.2d 811, 816 (Tex. Civ. App. 1974); *Sustaita v. Valle*, 38 S.W.2d 638 (Tex. Civ. App. 1931). However, plaintiffs made no effort to prove that they were the sole heirs. In fact, it was clear from plaintiffs' own pleadings in the earlier cases that plaintiffs were not the sole heirs or the sole beneficial owners of the estates' survival claims and plaintiffs' attorney acknowledged as much at oral argument. 47 F.3d at 1415. Thus, the court of appeals correctly determined that "[p]laintiffs' plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case."[6] 47 F.3d at 1415.

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and personal representatives of the estates." Petition at 4. However, later in the same section, when describing plaintiffs in this action, *de Aguilar II*, petitioners avoid any reference to their status as heirs or personal representatives. Petition at 9-10. Finally, in the portion of the Petition addressing the court of appeals' determination that plaintiffs lacked the authority to limit the estates' claims, petitioners refer to themselves as "heirs." Petition at 39. At no point in the argument do petitioners claim to be personal representatives of the decedents' estates. Nor do they take issue with the court of appeals' determination that they essentially abandoned their claim as personal representatives. *de Aguilar* II, 47 F.3d at 1414-15.

[6] Furthermore, even if plaintiffs had been appointed personal representatives of the decedents' estates, any attempt to limit the estates' damages without prior court approval would have been "unauthorized." *Catlett v. Catlett*, 630 S.W.2d 478, 483 (Tex. Ct. App. 1982).

3. Petitioners' Procedural Argument That Defendants Could Not Challenge Their Authority to Limit The Estates' Claims Is Frivolous

Petitioners contend that if Texas law governed their authority to limit the estates' claims, defendants were required to follow Texas state court procedure by filing a plea in abatement or verified denial in order to make a federal court challenge to plaintiffs' authority. *See* Petition at 40 n.10. This procedural argument is both off the mark and frivolous.

The issue before the district court was simply whether defendants were required to comply with Rule 93(1) of the Texas Rules of Civil Procedure when they challenged plaintiffs' authority to limit the estates' damages in federal court. Rules 11 and 12 of the Federal Rules of Civil Procedure do not require a plea in abatement or a verified denial. Plaintiffs did not and could not assert that the pleading requirements spelled out in the Federal Rules of Civil Procedure are unconstitutional or in violation of the language of the Rules Enabling Act, 28 U.S.C. § 2072. *See Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438, 441 (E.D. Tex. 1989); Mem. Op., Pet. App. A at A16. Thus, the courts below correctly determined that the Federal Rules of Civil Procedure provided the proper procedure for defendants to challenge plaintiffs' capacity to limit the estates' claims. It is undisputed that defendants complied with federal procedures.[7]

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[7] While *Hanna v. Plumer*, 380 U.S. 460 (1965), and its progeny provide the obvious rebuttal to plaintiffs' argument, and the one relied on by the courts below, it is not the only rebuttal. As defendants pointed out to the courts below, there is a distinction under Texas law between the capacity of individual heirs to commence an action (*e.g.*, to toll a limitations period) and their authority to compromise the estate's claim or to take it to judgment. Rec. at 199-203. At issue in this case was only

4. Petitioners' Contention That Their Authority To Limit The Estates' Claims Should Have Been Determined Under Mexican Law Is Without Merit

Petitioners also attack the court of appeals' determination that petitioners' authority to limit the claims of the decedents' estates under the Texas Survival Statute was governed by Texas law. Petition at 41-43. Again, petitioners' argument is frivolous.

The court of appeals explained its decision to apply Texas law as follows:

> Mexico has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas law to meet certain requirements. In addition, uniformity and predictability in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. *See Duncan* [*v. Cessna Aircraft Co.*], 665 S.W.2d [414, 422 (Tex. 1984)]. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

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the latter concept. Under Texas law, a failure to join the personal representative or all the heirs can be raised by a party at any time or by the court on its own motion even if not raised by a party. *Phillips v. Teinert*, 493 S.W.2d 584, 585-86 (Tex. Civ. App. 1973). Thus, even if the district court had concluded that Rule 93(1) of the Texas Rules of Civil Procedure applied, defendants would have been entitled to raise the issue of plaintiffs' lack of authority to bind the estates.

47 F.3d at 1414. Petitioners' reliance on *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds, remanded, Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, *later proceeding, In re Air Crash Disaster Near New Orleans*, 883 F.2d 17 (5th Cir. 1989), is entirely misplaced. Texas choice of law rules require application of "'the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.'" *de Aguilar II*, 47 F.3d at 1413 (quoting *Restatement (Second) of Conflict of Laws* § 145 (1971)). The fact that Uruguay was found to have the most significant relationship to the damages issue in *In re Air Crash Disaster Near New Orleans* has no bearing on the issue before the court of appeals in this case, namely whether Texas or Mexico had a greater interest in requiring those who take advantage of Texas law to meet certain requirements.

Petitioners also assert that "previous courts in this case have held that Mexican law applies." Petition at 43. Petitioners fail to identify what rulings they are referring to. Presumably their argument is based on one or more of the decisions granting *forum non conveniens* dismissal in which the courts found that the likelihood that the laws of Mexico would apply on some of the substantive law issues in the case, such as the measure of damages, was a factor favoring *forum non conveniens* dismissal. If this is what petitioners are referring to, their argument is plainly wrong. No court in addressing the issue of *forum non conveniens* has ruled on the law to be applied in determining whether plaintiffs have the authority to limit the claims of the decedents' estates.

Even if the law of Mexico were applied, petitioners have failed here — as they did in the courts below — to provide *any* proof that Mexican law differed in any way from Texas law on the issue of an individual heir's capacity to limit damages on behalf of a decedent's estate. When plaintiffs finally did decide — nearly two months after defendants removed

this case — that it might be in their interest to seek the application of Mexican law, the only showing they made as to the content of Mexican law was the following statement in a brief signed by Texas lawyers.

> Pursuant to Mexican law, a law which Defendants have alleged applies to the case, if an administrator has been appointed, heirs must enforce their rights through an administrator, ***but*** if an administrator has not been appointed, the heirs may make their claims directly. Civil Code of Federal District 1281-1294, 1599-1791.

Rec. at 476.

Even if this statement could have been considered evidence of Mexican law, plaintiffs intentionally or unintentionally confused the questions of (a) an individual heir's standing to bring an action on behalf of an estate and (b) an individual heir's authority to compromise the claim or bring the action to judgment.[8] Defendants never challenged plaintiffs' standing to bring this action. Defendants did, however, challenge plaintiffs' authority to limit the estates' damages. Plaintiffs did not present *any* evidence that Mexican law, unlike Texas law, gave them that authority.

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[8] The affidavit that Ms. Guadalupe Bistrain signed and plaintiffs submitted to the trial court three months after removal had the same inherent flaw. The affidavit asserted only that "[e]ach of the named plaintiffs identified in the above-captioned lawsuit are authorized to *sue* in their capacity as an heir at law and/or personal representative for each of the respective decedents identified in Plaintiffs Original Petition filed under the style and cause number referenced above." Pet. App. F at A123 (emphasis added).

Moreover, petitioners completely ignore the fact that the district court reviewed the Mexican statutes that petitioners cited and determined that one of those statutes — Article 1289 — "may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate." Mem. Op., Pet. App. A at A25. Thus, all the evidence before the courts below supported a finding that plaintiffs lacked authority to make a binding damages limitation under Mexican law as well as Texas law.

II. THE DECISION OF THE COURT OF APPEALS THAT PLAINTIFFS DID NOT EFFECTIVELY SUE FOR LESS THAN THE JURISDICTIONAL AMOUNT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER

Petitioners identify three appellate court decisions that they contend conflict with *de Aguilar II* on the same matter: *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992); and *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994). None of those decisions, however, addressed the same issue presented in *de Aguilar II*. Rather, in all these cases there was no evidence that the damages suffered by plaintiffs exceeded the federal jurisdictional minimum of $50,000, and there was no effort by any of those plaintiffs somehow to limit to $50,000 a claim that would otherwise far exceed the jurisdictional minimum. In this case, by contrast, the court of appeals found it to be "facially apparent that the damages rise to a level above $50,000," 47 F.3d at 1412, and the only real issue was the efficacy and good faith of purported limits on the claims to recover those damages.

In *Laughlin*, the plaintiff-appellant commenced an action in state court alleging damages for each of two claims "in excess of $10,000." 50 F.3d at 873. Kmart subsequently filed a notice of removal, but the notice did not refer to an amount in

controversy and failed to include any of the facts establishing the requisite jurisdictional amount. *Id.*

When the case reached the court of appeals following a dispositive motion, the court of appeals held that subject matter jurisdiction was lacking. The court based its decision on the fact that "[n]either Laughlin's petition nor Kmart's notice of removal establish[ed] the requisite jurisdictional amount." *Id.* The court quoted *Gaus*, 980 F.2d at 567, for the proposition that "the burden is on the party requesting removal to set forth, in the notice of removal itself, the '*underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000.'" 50 F.3d at 873. This was not done and the court of appeals held that defendant's effort to supplement the record on appeal would not be allowed.

This case, in contrast to *Laughlin*, does not involve a failure to refer, in the notice of removal, to the amount in controversy or a failure to set forth the underlying facts establishing that the amount in controversy exceeds $50,000. The Notice of Removal filed by Boeing and the other defendants explicitly stated that "each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000, exclusive of interest and costs." Notice of Removal, Boeing App. B. Furthermore, the Notice of Removal set forth in detail the facts supporting such statement with reference to a supporting affidavit attached as Exhibit A to the Notice of Removal.[9] *Id.* As the court of appeals stated in describing the removal of this case:

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[9] Petitioners' appendices omit the signature blocks for defendants-respondents Delta Airlines, Inc. and Parker Hannifin Corporation, as well as all the exhibits to the Notice of Removal, Pet. App. D. The omitted exhibits include the Affidavit of Howard L. Close In Support of Defendants' Notice of Removal and Attachments 1 and 2 thereto, which set forth facts establishing the amount in controversy. The complete

> [D]efendants . . . removed . . ., establishing in their notice of removal that the amount in controversy exceeded $50,000.

47 F.3d at 1407.[10]

With respect to the Ninth Circuit Court of Appeals' decision in *Gaus*, petitioners state:

> [T]he court in *Gaus* indicated . . . that, if the plaintiff had expressly sought less than the jurisdictional minimum, the plaintiff would have been entitled to remand.

Petition at 47. In fact, no such ruling — whether express, implied or in dicta — can be found in the *Gaus* decision.

In *Gaus*, the plaintiff-appellant filed suit in state court alleging damages "in excess of $10,000." 980 F.2d at 565. The defendant removed the case to federal court alleging in the notice of removal that "the matter in current controversy . . . exceeds the sum of $50,000." *Id.* The court of appeals ruled that the defendant bears the burden of proving the facts to support jurisdiction, including the jurisdictional amount, by a preponderance of the evidence where it is unclear from the

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Notice of Removal and Exhibit A thereto is appended hereto as Boeing App. B.

[10] Kmart has filed a petition for a writ of certiorari in *Laughlin*, in which Kmart cites *de Aguilar II* for the proposition that "where the amount of damages a plaintiff seeks is unclear, the appellate court is to look to the entire record and make an independent evaluation as to whether the jurisdictional amount is met." Kmart Petition at 10. This characterization of *de Aguilar II* fails to acknowledge the fundamental difference between the Notice of Removal filed in *de Aguilar II* and the notice of removal filed in *Laughlin*.

complaint what amount of damages the plaintiff has sought. *Id.* at 566-67.[11]

Because the defendant-appellee "offered no facts whatsoever to support the court's exercise of jurisdiction," the court of appeals returned the case to the district court with instructions to remand.

The decision in *Gaus* is entirely in accord with the Fifth Circuit decisions in *de Aguilar I* and that portion of *de Aguilar II* describing the principles on which the decision in *de Aguilar I* was based. However, the *Gaus* court never reached the question presented in *de Aguilar II*, namely what happens when a plaintiff files a pleading or other paper purporting to limit the claim to less than the actual damages and less than the jurisdictional minimum. Petitioners' contention that *Gaus* addressed this issue (and resolved it in a manner that conflicts with *de Aguilar II)* is simply incorrect.

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[11] The Fifth Circuit articulated the same rule in *de Aguilar I* and recited it with approval in *de Aguilar II*:

> In *de Aguilar I*, we stated that "[w]hen the plaintiff's complaint does not allege a specific amount of damages, the *removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000.*" 11 F.3d at 58 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992); *Garza [v. Bettcher Indus., Inc.]*, 752 F. Supp. [753, 763 (E.D. Mich. 1990)]). *See also Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

47 F.3d at 1409 (emphasis added).

Finally, the issue presented in *Burns* was also substantially different from the issue faced by the court in *de Aguilar II*. In *Burns*, the plaintiff filed a complaint in Alabama state court seeking damages "in such sum as the jury determines to be just, lawful, and fair, but not more than $45,000 plus costs." 31 F.2d at 1094. The defendant removed the case on the basis that the prayer for relief did not cap the plaintiff's recoverable damages and that the plaintiff could at a later date seek to recover more than $50,000. The district court declined to remand and subsequently dismissed the case on a dispositive motion.

The Eleventh Circuit Court of Appeals began its analysis by observing that there was no jurisdiction on the face of the plaintiff's claim because the complaint specifically requested no more than $45,000 in damages. *Id.* at 1095. The court held that, considering the specific nature of the plaintiff's damages claim, to avoid a remand "defendant must prove to a legal certainty that plaintiff's claim must exceed $50,000." *Id.* The court concluded that this burden had not been met: the defendant offered "nothing more than conclusory allegations that predict that plaintiff intends to wait a year from her filing date and then boost her damage request." More significantly, the court noted that defendant offered "no proof that plaintiff's prayer [was] grossly inconsistent with her alleged damages." *Id.* at 1097.

Petitioners correctly point out that *Burns* imposed a higher burden of proof on the defendant seeking to remove than the preponderance of the evidence test adopted in *de Aguilar II*. What petitioners fail to recognize, however, is that the issue before the court in *Burns* was substantially different than the issue in *de Aguilar II*.

First, in *Burns*, it was not apparent from the record that the damages alleged necessarily exceeded $50,000. 31 F.3d at 1097 ("no proof that plaintiff's prayer [for $45,000] is grossly

inconsistent with her alleged damages"). Rather, the defendant relied exclusively on the argument that the plaintiff was not bound by her plea and might in the future increase her claim; however, defendant never established that the actual damages suffered would even support a larger claim, much less that plaintiff was "manipulating" the pleadings to avoid federal court. In *de Aguilar II* the defendants produced evidence that the amount in controversy at the time of removal far exceeded $50,000. 47 F.3d at 1412. Moreover, the court of appeals in *de Aguilar II* expressly endorsed the ruling in *Burns* that the mere possibility that the plaintiff may in the future seek to recover more damages is insufficient to support federal jurisdiction. *Id.* at 1409.

Second, the plaintiff's plea for a specific amount of damages in *Burns* did not violate any rule governing pleadings submitted in Alabama state court. *See, e.g., Pepsi Cola Bottling Co. v. Allen*, 572 So. 2d 434 (Ala. 1990). Thus, the court in *Burns* could conclude that "plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth." 31 F.3d at 1095.[12] Plaintiffs' plea in *de Aguilar II*, in contrast, was submitted in direct violation of Rule 47 of the Texas Rules of Civil Procedure. Based on the finding that plaintiffs had manipulated their pleadings in bad faith, the court of appeals was justified in declining to give plaintiffs' plea the same deference accorded the plea in *Burns*.

CONCLUSION

Petitioners submitted their complaint in violation of the applicable pleading requirements and falsely claimed to be personal representatives of the decedents' estates in an effort

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[12] In *Burns*, there was no question that the plaintiff had the authority to limit the amount of damages she claimed.

to create the illusion that they were suing for less than the jurisdictional amount. The court of appeals did not depart from the accepted and usual course of judicial proceedings by holding that petitioners had not in good faith sued for less than the jurisdictional amount. No decision of this Court or any court of appeals supports a different result on the facts of this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 10, 1995

No. 95-102

In the

Supreme Court of the United States

October Term, 1995

ALMA TORREBLANCA DE AGUILAR, et al.,

Petitioners,

v.

THE BOEING COMPANY, et al.,

Respondents,

v.

COMPANIA MEXICANA DE AVIACION, S.A.,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDICES TO BRIEF IN OPPOSITION OF RESPONDENT BOEING

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, et al., Plaintiffs VS. THE BOEING COMPANY, et al., Defendants.	1:92-CV-537

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be GRANTED and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing filed a motion for summary judgment based on limitations and in the alternative a motion to dismiss Plaintiffs' claims based on forum non conveniens. Shortly thereafter, all other defen-

dants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

This case has been dismissed by four other federal courts on the basis of forum non conveniens. In fact, these same plaintiffs were dismissed on that basis by Judge Howell Cobb of the Eastern District of Texas. *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). Judge Cobb found that direct estoppel precluded Plaintiffs from relitigating the forum non conveniens issue. In the alternative, Judge Cobb rule the case would be dismissed on an independent determination under the doctrine of forum non conveniens. The court agrees with Judge Cobb's sound reasoning in the previous case. The court adopts that reasoning and results for this case. Because the court finds this is not a proper and convenient forum to try this case, it declines to rule on Defendants' motion for summary judgment.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is DISMISSED at Plaintiffs' cost.

SIGNED this the 11th of August, 1993.

/ S /

Richard A. Schell
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, AS REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA AS REPRESENTATIVE OF THE ESTATE OF CARMEN ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA de ALTSCHULER, DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; AND ALEJANDRO ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED;	CIVIL ACTION NO. 1:92CV 537

AND ANA MARIA ESPERANZA CUELLAR de BOURLON, AS REPRESENTATIVE OF THE ESTATE OF MARIA EMILIA BOURLON CUELLAR, DECEASED; ADELA CESPEDES de CORTINA, AS REPRESENTATIVE OF THE ESTATE OF MARIA del REFUGIO CORTINA CUELLAR, DECEASED; EDUARDO CALDERON, AS REPRESENTATIVE OF THE ESTATES OF EDUARDO CALDERON ZAVALA, DECEASED; GLORIA CALDERON SOTOMAYOR de BAUTISTA, DECEASED; CARLOS EDUARDO BAUTISTA CALDERON, DECEASED; AND LILIA BAUTISTA CALDERON, DECEASED; CARLOS de la TORRE DELGADILLO, AS REPRESENTATIVE OF THE ESTATE OF SYLVIA RIVERA PEREZ de la TORRE, DECEASED; JUAN de la O. GUZMAN, AS REPRESENTATIVE OF THE ESTATES OF HECTOR ARTURO de la O. MACIEL, DECEASED; YOLANDA BENITEZ de la O., DECEASED, AND HECTOR ARTUR de la O. BENITEZ, DECEASED; ESPERANZA ESTAVILLO DIAZ AND LUZ MARIA ESTAVILLO DIAZ, AS REPRESENTATIVES OF THE ESTATES OF HORACIO ESTAVILLO LAGUNA, DECEASED; MARIA de la LUZ DIAZ de ESTAVILLO, DECEASED; AND HORACIO ESTAVILLO DIAZ, DECEASED; LUIS GOMEZ DAZA RANGEL, AS REPRESENTATIVE OF THE ESTATE OF ADELA GOMEZ DAZA CORTINA, DECEASED; MARIA CONCEPCION GOMEZ HERNANDEZ,

AS REPRESENTATIVE OF THE ESTATES OF JESUS GOMEZ HERNANDEZ, DECEASED; AND TERESA HERNANDEZ de GOMEZ, DECEASED; DAVID L. JASQUI ELO AS REPRESENTATIVE OF THE ESTATES OF OF JACOBO JASQUI DEBBAH (DERBAH), DECEASED; RAQUEL NOAH de JASQUI, DECEASED; SOFIA JASQUI NOAH, DECEASED; TERESA JASQUI NOAH, DECEASED; AND DAVID JASQUI NOAH, DECEASED; JOHN EHRHARD KOHN CORNEJO, AS REPRESENTATIVE OF THE ESTATE OF CATIA (KATIA) KOHN PAZ de HERNANDEZ, DECEASED; MARIA MONICA RIVERO, la FUENTE de LUENGAS, AS REPRESENTATIVE OF THE ESTATE OF PALMIRA de la FUENTE RIVERO, DECEASED; ALEJANDRO MA GUADALUPE MERINO CASARIN, AS REPRESENTATIVE OF THE ESTATE OF OFELIA CASARIN ALCIBAR, DECEASED; JESUS ERNESTO MERINO ORTIZ, AS REPRESENTATIVE OF THE ESTATES OF MARGARITA del TORAL MERINO, DECEASED; MARGARITA MERINO del TORAL, DECEASED; CELIA MERINO del TORAL, DECEASED; AND MONICA MERINO del

TORAL, DECEASED; ING.EDEL OJEDA MALPICA, AS REPRESENTATIVE OF THE ESTATE OF LUIS ENRIQUE OJEDA SANTANA, DECEASED; GUILLERMO PIERDANT PEREZ, AS REPRESENTATIVE OF THE ESTATE OF HIGINIO PERIDANT QUIROZ, DECEASED; MARIA DOLOREZ ROSALES DIAZ, AS REPRESENTATIVE OF THE ESTATES OF JULIA DIAZ COBIAN de ROSALES, DECEASED; AND NATAEL GERARDO ROSALES FLORES, DECEASED; DAVID RODRIGUEZ DIAZ, AS REPRESENTATIVE OF THE ESTATES OF IMELDA ZALDIVAR MORENO de RODRIGUEZ, DECEASED; ANABEL RODRIGUEZ ZALDIVAR, DECEASED; MA GABRIELA RODRIGUEZ ZALDIVAR, DECEASED; JOSEFINA ROMERO de MATAGNE, AS REPRESENTATIVE OF THE ESTATE OF GENOVEVA BAUMGARTEN de BAUMGARTEN, DECEASED; MARIA TERESA SANTOS MUNOZ de CASTRO, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN CASTRO DIAZ, DECEASED; DELFINA GRACIELA TOVAR VDA de SOSA, AS REPRESENTATIVE OF THE ESTATE OF ENRIQUE ALEJANDRO SOSA ROJAS, DECEASED; LIC FERNANDO YZUNZA BRENA, AS REPRESENTATIVE OF THE

ESTATE OF FEDERICO YZUNZA BRENA, DECEASED; CAROLINA HUITRON ESPINOZA de YTUARDE, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN YTUARDE SALAZAR, DECEASED; OCTAVIO QUESNEL AND GRACIELA GALVAN de QUESNEL, AS REPRESENTATIVES OF THE ESTATE OF AMELIA FLORENICA QUESNEL GALVAN, DECEASED; MONICA COWLAND, AS REPRESENTATIVE OF THE ESTATE OF PETER MILES COWLAND, DECEASED; SOFIA LARTILLEAUX, AS REPRESENTATIVE OF THE ESTATES OF AYMERIC J. LARTILLEAUX, DECEASED; CHANTAL LARTILLEAUX, DECEASED; ELIZABETH LARTILLEAUX, DECEASED; ERIC LARTILLEUX, DECEASED; PIERRE LARTILLEUX, DECEASED; VIRGINIA LARTILLEUX, DECEASED; XAVIER LARTILLEUX, DECEASED; NATALIE LARTILLEUX, DECEASED; AND PIERRE LARTILLEUX, JR., DECEASED; PAUL RENEE PIAGET, AS REPRESENTATIVE OF THE ESTATE OF PHILIP LEWIS PIAGET RHORER, DECEASED; JAIME GUZMAN VAZQUEZ, AS REPRESENTATIVE OF THE ESTATE OF ANA ROSA GUZMAN FLORES, DECEASED; CARLOS ALBERTO GUADARRAMA, SR., AS REPRESENTATIVE OF THE ESTATE OF

CARLOS ALBERTO GUADARRAMA, DECEASED; DR. ROBERTO PINON LOZANO, AS REPRESENTATIVE OF THE ESTATE OF HAYDEE LOZANO de PINON, DECEASED; DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED

PLAINTIFFS.

VS.

THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,

DEFENDANTS.

DEFENDANTS' NOTICE OF REMOVAL

TO: CLERK, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

AND TO: PLAINTIFFS ALMA TORREBLANCA DE AGUILAR, ET AL;

AND TO: DENNIS C. REICH, ATTORNEY AT LAW
4265 San Felipe, Suite 620
Houston, TX 77027, Plaintiffs' Attorney

AND TO: MITCHELL A. TOUPS
WELLER, WHEELUS & GREEN
550 Fannin, 5th Floor
Beaumont, TX 77701

COME now defendants The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation and hereby give notice of removal of the above-captioned action, and in support thereof state as follows:

BASIS FOR REMOVAL

I.

This is a civil action arising from the crash of Mexicana Airlines Flight 940 in the mountains west of Mexico City on March 31, 1986. The civil action was filed in the District Court of Jefferson County, Texas on November 5, 1992, and assigned Cause No. B-144,222. The 38 named plaintiffs assert that they are the "personal representatives of the estates" of 69 passengers killed in the crash. Plaintiffs' Original Petition alleges negligence and product liability claims on behalf of those 38 named plaintiffs against The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc. and Parker Hannifin Corporation.

II.

On information and belief, none of the plaintiffs are citizens of any state of the United States; all are foreign nationals residing outside the United States, primarily in Mexico. Pursuant to 28 U.S.C. § 1332(c)(2), the legal representative of the

estate of a decedent shall be deemed to be a citizen only of the same state as the decedent. On information and belief, none of the decedents whose estates are represented by plaintiffs were citizens of any state of the United States; like the plaintiffs, all decedents were foreign nationals residing outside the United States, primarily in Mexico.

III.

The defendants are citizens of the following states:

Defendant	State of Incorporation	Principal Place of Business
Boeing	Delaware	Washington
B.F. Goodrich	New York	Ohio
Goodyear Tire	Ohio	Ohio
Delta Air Lines	Delaware	Georgia
Parker Hannifin	Ohio	Ohio

None of the defendants is a citizen of Texas.

IV.

On a reasonable reading of the record, each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000, exclusive of interest and costs. Plaintiffs' claims are based on § 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute. Plaintiffs claim that the decedents, "during the flight of the aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering." The nature of the damages alleged is such that a judgment in excess of $50,000 per decedent, exclusive of interest and costs, is a reasonable possibility.

V.

Plaintiffs' purport to limit the amount in controversy by stating in their petition that the value of the damages sought by each decedent's estate will not exceed $50,000 and by appending to the petition an affidavit of plaintiffs' attorney stating that each claim on behalf of each decedent is for less than $50,000 exclusive of interest and court costs. However, as detailed below, despite an allegation in the petition that "[p]laintiffs bring this action as personal representatives of the estates of each decedent named below," none of the plaintiffs have in fact been appointed as personal representatives of the estate of the decedent(s) whose rights they purport to represent. Thus, no plaintiff has the authority to limit the substance or amount of claims on behalf of the decedent's estates. Plaintiffs' attempts to do so are meaningless and must be disregarded in determining the amount in controversy in this matter.

VI.

By letter dated November 25, 1992, counsel for defendant The Boeing Company tendered an affidavit to plaintiffs' attorney, Dennis C. Reich, for his signature, asking him to confirm, among other things, that plaintiffs had the necessary authority to limit the claims of each decedent's estate to no more than $50,000, and that plaintiffs' attorneys had been authorized by plaintiffs to make a binding admission on their behalf. A copy of the letter and accompanying affidavit is Attachment 1 to the Affidavit of Howard L. Close, which is attached hereto as Exhibit A. The proposed affidavit requested plaintiffs' attorney to attest in pertinent part that:

> Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of

> the decedent(s) whose rights he or she purports to represent.

Proposed Affidavit, Attachment 1 to the affidavit of Howard L. Close, Exhibit A hereto.

VII.

On or about December 4, 1992, plaintiffs' attorney, Mitchell A. Toups, advised counsel for defendant The Boeing Company, Howard L. Close, that plaintiffs' attorneys could not sign the affidavit in the form tendered by Boeing because (1) none of the plaintiffs had been appointed as personal representatives of the estate of the decedent(s) whose rights they purported to represent (even though Plaintiffs' Original Petition alleged that each plaintiff had this status); and (2) none of plaintiffs' attorneys in this action (including Mr. Reich, who executed the affidavit appended to Plaintiffs' Petition) had actually communicated with plaintiffs on any of these subjects; their information came solely from attorneys in Mexico. Affidavit of Howard L. Close ¶ 4. Plaintiffs' attorneys sent counsel for defendant Boeing handwritten revisions to the proposed affidavit, whereby they proposed to delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative of the estate of the decedent(s) whose rights he or she purports to represent as well as to delete any referenced to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed, or to plaintiffs having confirmed "to me [Mr. Reich]" that they understood they were making an irrevocable commitment. A copy of plaintiffs' handwritten revisions to the proposed affidavit is Attachment 2 to the Affidavit of Howard L. Close, Exhibit A hereto.

VIII.

Since plaintiffs were not at the time Plaintiffs' Original Petition was filed, and are not now, properly appointed per-

sonal representatives of the estates of the decedent(s) whose rights they purport to represent, neither plaintiffs, nor plaintiffs' attorneys, have the authority to limit the amount claimed by the estate of any decedent. The purported agreement of plaintiffs and their attorneys to limit the damages sought is meaningless and has no bearing on the amount in controversy in this matter.

IX.

Based on the foregoing facts, this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. Removal of this action is therefore proper under 28 U.S.C. § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . .," and 28 U.S.C. § 1441(b).

TIMELINESS OF REMOVAL

X.

A copy of the citation and Plaintiffs' Original Petition ("The Complaint"), the initial pleading setting forth plaintiffs' claim for relief, were served upon each defendant in this action on November 12, 1992. Certified copies of the citations (reduced in size) and the complaint as well as the docket sheet and all pleadings filed in the state court are attached as Exhibit "B" pursuant to 28 U.S.C. § 1446(a). Because this Notice of Removal is being filed within 30 days after service of the complaint, removal is timely under 28 U.S.C. § 1446(b).

VENUE OF REMOVED ACTION

XI.

Because this Court is the United States District Court for the district and division embracing the place where the state

court action is pending, it is the appropriate court for removal under 28 U.S.C. § 1441(a).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 11th day of December, 1992.

Respectfully submitted,

/ S /

Howard L. Close
State Bar #04406500

ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412
FAX 409/838-6959

ATTORNEYS FOR DEFENDANT,
THE BOEING COMPANY

/ S /

Gerald L. Bracht
TX Bar No. 02806000

MAYOR, DAY, CALDWELL &
KEETON, L.L.P.
1900 NCNB Center
700 Louisiana
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(713-225-7035
FAX # 713-225-7047

ATTORNEYS FOR DEFENDANTS,
THE B.F. GOODRICH COMPANY

AND THE GOODYEAR TIRE AND RUBBER COMPANY

/ S /

Jad J. Stepp
TX Bar No. 19169100

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20th Floor
The Niels Esperson Building
808 Travis Street
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713-225-0905
FAX # 713-225-2907

ATTORNEYS FOR DEFENDANT, DELTA AIR LINES, INC.

/ S /

George S. McCall
TX Bar No. 13344800

G. Don Swaim
TX Bar No. 19545200

KEARN & WOOLEY
5215 North O'Connor Road
Suite 1700
Irving, TX 75039
214-869-3311
FAX # 214-869-2433

ATTORNEYS FOR DEFENDANT,
PARKER HANNIFIN
CORPORATION

EXHIBIT A TO
DEFENDANTS' NOTICE OF REMOVAL

IN THE UNITED STATES DISTRICT
COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, AS REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA AS REPRESENTATIVE OF THE ESTATE OF CARMEN ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA de ALTSCHULER, DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; AND ALEJANDRO ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED; AND ANA MARIA ESPERANZA CUELLAR de BOURLON, AS REPRESENTATIVE OF THE ESTATE OF MARIA EMILIA BOURLON CUELLAR, DECEASED; ADELA CESPEDES de	CIVIL ACTION NO. 1:92CV 537

CORTINA, AS REPRESENTATIVE OF THE ESTATE OF MARIA del REFUGIO CORTINA CUELLAR, DECEASED; EDUARDO CALDERON, AS REPRESENTATIVE OF THE ESTATES OF EDUARDO CALDERON ZAVALA, DECEASED; GLORIA CALDERON SOTOMAYOR de BAUTISTA, DECEASED; CARLOS EDUARDO BAUTISTA CALDERON, DECEASED; AND LILIA BAUTISTA CALDERON, DECEASED; CARLOS de la TORRE DELGADILLO, AS REPRESENTATIVE OF THE ESTATE OF SYLVIA RIVERA PEREZ de la TORRE, DECEASED; JUAN de la O. GUZMAN, AS REPRESENTATIVE OF THE ESTATES OF HECTOR ARTURO de la O. MACIEL, DECEASED; YOLANDA BENITEZ de la O., DECEASED, AND HECTOR ARTUR de la O. BENITEZ, DECEASED; ESPERANZA ESTAVILLO DIAZ AND LUZ MARIA ESTAVILLO DIAZ, AS REPRESENTATIVES OF THE ESTATES OF HORACIO ESTAVILLO LAGUNA, DECEASED; MARIA de la LUZ DIAZ de ESTAVILLO, DECEASED; AND HORACIO ESTAVILLO DIAZ, DECEASED; LUIS GOMEZ DAZA RANGEL, AS REPRESENTATIVE OF THE ESTATE OF ADELA GOMEZ DAZA CORTINA, DECEASED; MARIA CONCEPCION GOMEZ HERNANDEZ,

AS REPRESENTATIVE OF THE ESTATES OF JESUS GOMEZ HERNANDEZ, DECEASED; AND TERESA HERNANDEZ de GOMEZ, DECEASED; DAVID L. JASQUI ELO AS REPRESENTATIVE OF THE ESTATES OF OF JACOBO JASQUI DEBBAH (DERBAH), DECEASED; RAQUEL NOAH de JASQUI, DECEASED; SOFIA JASQUI NOAH, DECEASED; TERESA JASQUI NOAH, DECEASED; AND DAVID JASQUI NOAH, DECEASED; JOHN EHRHARD KOHN CORNEJO, AS REPRESENTATIVE OF THE ESTATE OF CATIA (KATIA) KOHN PAZ de HERNANDEZ, DECEASED; MARIA MONICA RIVERO, la FUENTE de LUENGAS, AS REPRESENTATIVE OF THE ESTATE OF PALMIRA de la FUENTE RIVERO, DECEASED; ALEJANDRO MA GUADALUPE MERINO CASARIN, AS REPRESENTATIVE OF THE ESTATE OF OFELIA CASARIN ALCIBAR, DECEASED; JESUS ERNESTO MERINO ORTIZ, AS REPRESENTATIVE OF THE ESTATES OF MARGARITA del TORAL MERINO, DECEASED; MARGARITA MERINO del TORAL, DECEASED; CELIA MERINO del TORAL, DECEASED; AND MONICA MERINO del

TORAL, DECEASED; ING. EDEL OJEDA MALPICA, AS REPRESENTATIVE OF THE ESTATE OF LUIS ENRIQUE OJEDA SANTANA, DECEASED; GUILLERMO PIERDANT PEREZ, AS REPRESENTATIVE OF THE ESTATE OF HIGINIO PERIDANT QUIROZ, DECEASED; MARIA DOLOREZ ROSALES DIAZ, AS REPRESENTATIVE OF THE ESTATES OF JULIA DIAZ COBIAN de ROSALES, DECEASED; AND NATAEL GERARDO ROSALES FLORES, DECEASED; DAVID RODRIGUEZ DIAZ, AS REPRESENTATIVE OF THE ESTATES OF IMELDA ZALDIVAR MORENO de RODRIGUEZ, DECEASED; ANABEL RODRIGUEZ ZALDIVAR, DECEASED; MA GABRIELA RODRIGUEZ ZALDIVAR, DECEASED; JOSEFINA ROMERO de MATAGNE, AS REPRESENTATIVE OF THE ESTATE OF GENOVEVA BAUMGARTEN de BAUMGARTEN, DECEASED; MARIA TERESA SANTOS MUNOZ de CASTRO, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN CASTRO DIAZ, DECEASED; DELFINA GRACIELA TOVAR VDA de SOSA, AS REPRESENTATIVE OF THE ESTATE OF ENRIQUE ALEJANDRO SOSA ROJAS, DECEASED; LIC FERNANDO YZUNZA BRENA, AS REPRESENTATIVE OF THE

ESTATE OF FEDERICO YZUNZA BRENA, DECEASED; CAROLINA HUITRON ESPINOZA de YTUARDE, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN YTUARDE SALAZAR, DECEASED; OCTAVIO QUESNEL AND GRACIELA GALVAN de QUESNEL, AS REPRESENTATIVES OF THE ESTATE OF AMELIA FLORENICA QUESNEL GALVAN, DECEASED; MONICA COWLAND, AS REPRESENTATIVE OF THE ESTATE OF PETER MILES COWLAND, DECEASED; SOFIA LARTILLEAUX, AS REPRESENTATIVE OF THE ESTATES OF AYMERIC J. LARTILLEAUX, DECEASED; CHANTAL LARTILLEAUX, DECEASED; ELIZABETH LARTILLEAUX, DECEASED; ERIC LARTILLEUX, DECEASED; PIERRE LARTILLEUX, DECEASED; VIRGINIA LARTILLEUX, DECEASED; XAVIER LARTILLEUX, DECEASED; NATALIE LARTILLEUX, DECEASED; AND PIERRE LARTILLEUX, JR., DECEASED; PAUL RENEE PIAGET, AS REPRESENTATIVE OF THE ESTATE OF PHILIP LEWIS PIAGET RHORER, DECEASED; JAIME GUZMAN VAZQUEZ, AS REPRESENTATIVE OF THE ESTATE OF ANA ROSA GUZMAN FLORES, DECEASED; CARLOS ALBERTO GUADARRAMA, SR., AS REPRESENTATIVE OF THE ESTATE OF

CARLOS ALBERTO GUADARRAMA, DECEASED; DR. ROBERTO PINON LOZANO, AS REPRESENTATIVE OF THE ESTATE OF HAYDEE LOZANO de PINON, DECEASED; DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED

PLAINTIFFS.

VS.

THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,

DEFENDANTS.

AFFIDAVIT OF HOWARD L. CLOSE IN SUPPORT OF DEFENDANTS' NOTICE OF REMOVAL

STATE OF TEXAS §

COUNTY OF JEFFERSON §

HOWARD L. CLOSE, being duly sworn upon oath, states:

1. I am an attorney with the law firm of Orgain, Bell & Tucker, L.L.P., 470 Orleans Street, Beaumont, Texas 77701.

2. I am an attorney of record for The Boeing Company in this matter.

3. Attached hereto as Attachment 1 is a true and correct copy of a letter and attached proposed affidavit that I sent to plaintiffs' attorney, Dennis C. Reich, by facsimile on November 25, 1992. I sent the proposed affidavit to Mr. Reich in an attempt to confirm that he in fact did have the proper authority from the appropriate persons to limit plaintiffs' claims in this matter to $50,000.00 per decedent and that such limitation covered all claims and was irrevocable.

4. On December 4, 1992, one of the plaintiffs' attorneys, Mitchell A. Toups, advised me by telephone that plaintiffs' attorneys could not sign the affidavit tendered by Boeing. He stated that to his knowledge none of the plaintiffs had been appointed as personal representatives of the estates of the decedents whose rights they purported to represent. Mr. Toups also advised me that neither he nor Mr. Reich had received any authority to limit plaintiffs' claims in this matter directly from the plaintiffs themselves. Mr. Toups advised me that both he and Mr. Reich had only dealt with attorneys in Mexico who represent the plaintiffs in order to get the approval to execute the affidavit that was attached to Plaintiffs' Original Petition.

5. Attached hereto as Attachment 2 is a true and correct copy of the proposed affidavit with handwritten revisions that I received by facsimile from Mr. Toups' office on December 4, 1992. Mr. Toups advised me that Mr. Reich would sign the affidavit only if he could (1) delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative; and (2) delete any reference to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed.

/ S /
HOWARD L. CLOSE

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 11th day of December, 1992.

/ S /
Notary Public, State of Texas
My Commission Expires:_____

**ATTACHMENT 1 TO
AFFIDAVIT OF HOWARD L. CLOSE IN
SUPPORT OF DEFENDANTS' NOTICE
OF REMOVAL**

November 25, 1992

Via Facsimile

Dennis C. Reich, Esq.
Reich & Binstock
4265 San Felipe, Suite 620
Houston, TX 77027

Re: Torreblanca, et al v. The Boeing Company, et al.
OB&T File: 48145

Dear Dennis:

We have reviewed the affidavit appended to the latest version of Plaintiffs' Original Petition. The affidavit does not establish that the amount in controversy in this action does not exceed fifty thousand dollars ($50,000) per decedent.

We are enclosing an alternative affidavit that we prepared for your signature. Assuming that the statements contained in the affidavit are true and that you are properly authorized to sign it, this affidavit would establish that the plaintiffs in this action are in fact seeking no more than fifty thousand dollars ($50,000). We ask that you review the affidavit and advise us within the next ten days whether you are able and willing to sign it. If you object to part but not all of the affidavit, we ask that you identify the portions of the affidavit you are able and willing to sign.

The affidavit requires you to attest that each plaintiff has been properly appointed as a personal representative and expressly has authorized you to irrevocably agree to limit the damages claimed. We wish to review the documents and records establishing each plaintiff's appointment as a personal representative and your authority to limit the damages claimed

by each plaintiff. Please advise us whether this can be done on a cooperative basis and, if so, how soon you can make the information available to us.

Sincerely,

/ S /

Howard L. Close

HLC/sj
Enclosure
cc: Mitch Toups

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

> "My name is Dennis C. Reich. I am over twenty-one years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated.
>
> I am the attorney for each Plaintiff in this matter. Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.
>
> Each Plaintiff in this matter expressly has granted me the authority and I hereby judicially admit that no Plaintiff herein, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of a decedent, or his or her capacity as guardian or next friend of a minor, will ever seek more than fifty thousand dollars ($50,000) per decedent exclusive of interest and court costs in this action. Each Plaintiff herein also expressly has granted me the authority and I hereby agree on their behalf that this Court may enter an order which places an irrevocable cap on damages in this matter of fifty thousand dollars ($50,000)

per decedent exclusive of interest and court costs.

Finally, each Plaintiff expressly has granted me the authority and I hereby agree on their behalf that no plaintiff, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of the decedent, or his or her capacity as guardian or next friend of a minor, will ever (1) seek to amend the Petition in this action; or (2) file any other claims arising out of the March 31, 1986 crash of Mexicana Airlines Flight 940 against the defendants named herein, including but not limited to claims for wrongful death, funeral and burial expenses, pecuniary loss, loss of support, love, affection, care, services, companionship, society, marital consortium, parental consortium or survivors' emotional anguish and psychological distress.

I have explained the terms of all of the agreements outlined above to each Plaintiff herein and each Plaintiff has indicated to me that he/she understands (1) the terms of each agreement; and (2) that all of the agreements are irrevocable.

I have personal knowledge of each fact set forth herein and they are true and correct."

_____

DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this ____ day of _____, 1992, to certify which witness my hand and seal of office.

_____
NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires:

_____

_____
Typed or Printed Name of Notary

**ATTACHMENT 2 TO
AFFIDAVIT OF HOWARD L. CLOSE IN
SUPPORT OF DEFENDANTS' NOTICE
OF REMOVAL**

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

"My name is Dennis C. Reich. I am over twenty-one years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated.

I am the attorney for each Plaintiff in this matter. ~~Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.~~

Each Plaintiff in this matter ~~expressly~~ has granted me the authority and I hereby judicially admit that no Plaintiff herein, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of a decedent, or his or her capacity as guardian or next friend of a minor, will ever seek more than fifty thousand dollars ($50,000) per decedent exclusive of interest and court costs in this action. Each Plaintiff herein also expressly has granted me the authority and I hereby agree on their behalf that this Court may enter an order which places an irrevocable cap on damages in this matter of fifty thousand dollars ($50,000)

per decedent exclusive of interest and court costs.

Finally, each Plaintiff ~~expressly~~ has granted me the authority and I hereby agree on their behalf that no plaintiff, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of the decedent, or his or her capacity as guardian or next friend of a minor, will ever (1) seek to amend the Petition in this action; or (2) file any other claims arising out of the March 31, 1986 crash of Mexicana Airlines Flight 940 against the defendants named herein, including but not limited to claims for wrongful death, funeral and burial expenses, pecuniary loss, loss of support, love, affection, care, services, companionship, society, marital consortium, parental consortium or survivors' emotional anguish or psychological distress.

I have explained the terms of all of the agreements outlined above to ~~each~~ the Plaintiffs herein and the ~~each~~ Plaintiff haves indicated ~~to me~~ that he/she understands (1) the terms of each agreement; and (2) that all of the agreements are irrevocable.

I have personal knowledge of each fact set forth herein and they are true and correct."

_____

DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this ____ day of _____, 1992, to certify which witness my hand and seal of office.

_____

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires:

_____

_____

Typed or Printed Name of Notary